

SENATE BILL REPORT

SB 5133

As Reported By Senate Committee On:
Judiciary, March 2, 2005

Title: An act relating to privileged communications between spouses.

Brief Description: Revising provisions relating to privileged communications between spouses.

Sponsors: Senators Brandland, McCaslin, Johnson and Mulliken.

Brief History:

Committee Activity: Judiciary: 1/27/05, 3/2/05 [DP, DNP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.

Signed by Senators Kline, Chair; Weinstein, Vice Chair; Johnson, Ranking Minority Member; Esser, Hargrove, McCaslin and Rasmussen.

Minority Report: Do not pass.

Signed by Senator Carrell.

Staff: Aldo Melchiori (786-7439)

Background: The husband-wife privilege, in Washington, encompasses two rules: confidential communications and the rule of incompetency. These rules, generally, do not apply in the case of civil or criminal proceeding by one spouse against the other or a child, in some cases involving testimony as evidence in civil commitment proceedings, and in cases alleging witness tampering.

The rule regarding confidential communications is that neither the husband nor the wife may be examined, either during the marriage or afterward, as to any communications made one to the other during the marriage without the consent of the other. This provision creates a privilege for communications between spouses for communications made during the marriage. Oral and written communications are included and the Washington Supreme Court has excluded testimony regarding acts done by one spouse in view of the other. The privilege survives the death of a spouse, but it does not apply if the marriage occurred subsequent to the filing of criminal charges. The privilege can be destroyed by the presence of a third party. The privilege is held by the spouse who did the communicating and may only be waived by that person.

The rule of incompetency states that "[A] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." The rule only applies to persons who are married at the time of trial. A third person who overheard the statements may be able to testify as to its contents. The rule may be waived if the party fails to timely object.

Summary of Bill: The rule regarding confidential communications (privilege) does not apply in felony criminal proceedings involving both spouses in a allegation of criminal conspiracy or joint criminal activity with each other. The rule of competency is amended such that the spouse being examined is able to consent to the examination. It is the prerogative of witnesses to decide whether or not to testify for or against their spouses.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This new rule would be consistent with federal law and that of many states. The spouse is being given the choice of whether or not to testify, so the Fifth Amendment to the United States constitution is not violated. People who act in concert to commit crimes should not be shielded by spousal privilege when the witness/spouse, with a conscience, admits to the crime and wants to testify. The power should rest with the spouse who wants to testify, not the alleged wrongdoer. The bill is narrowly drawn in the respect that the privilege rule change applies only to felony cases when the spouses acted in concert to commit the crime.

Testimony Against: This state values privacy more than most others and should continue to do so. Intimacy in the marriage relationship is furthered by privacy. The bill is unnecessary because people are being convicted under the present rules. A law that is working well over a long period of time should not be changed to make the prosecutor's job easier in hard cases.

Who Testified: PRO: Kristin Richardsen, WAPA, King County Prosecuting Attorney's Office; Brian Moran, Assistant AG; Lonnie Johns-Brown, WA Coalition of Sexual Assault Programs.

CON: Jennifer Shaw, ACLU of Washington; Doug Hyldahl, WACDL.